

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JUAN ALFONSO NUNO VELASCO,

Petitioner,

v.

TIMOTHY FILSON,¹ *et al.*,

Respondents.

Case No. 3:13-cv-00431-MMD-VPC

ORDER

Before the Court is respondents' motion to dismiss (ECF No. 51), which asks the Court to dismiss portions of petitioner Nuno Velasco's amended petition for writ of habeas corpus (ECF No. 47). With their motion, respondents argued that Ground 5 of the petition is unexhausted and that claims in the amended petition that do not "relate back" to the initial petition must be dismissed as untimely. As to the latter argument, respondents claimed they were unable to identify the untimely claims without a certified translation of the initial petition from Spanish to English.

Since the filing of the motion to dismiss, Nuno Velasco has formally abandoned Ground 5. (ECF No. 65.) Thus, that issue has been resolved. He has also provided a translation of his initial petition. (ECF No. 64.)

¹Timothy Filson is automatically substituted for Renee Baker as the Warden of Ely State Prison. Fed. R. Civ. P. 25(d).

1 Respondents now contend that certain allegations in Ground 1 and Ground 2 of
2 the amended petition do not relate back to the initial petition.² In *Mayle v. Felix*, 545 U.S.
3 644 (2005), the court held that an amended claim in a habeas petition relates back for
4 statute of limitations purposes only if it shares a "common core of operative facts" with
5 claims contained in the original petition. *Id.* at 663-64. The common core of operative
6 facts must not be viewed at too high a level of generality, and an "occurrence," for the
7 purposes of Fed. R. Civ. P. 15(c), will consist of each separate set of facts that supports
8 a ground for relief. *Id.* at 661.

9 In Ground 1, Nuno Velasco contends that his conviction violates his constitutional
10 rights because the state trial court did not allow him to withdraw his guilty plea.
11 Respondents point out that the amended petition includes an allegation absent from the
12 initial petition, that being, that "[p]etitioner was threatened with bodily harm if he did not
13 take the deal and pleaded guilty because he feared for his own safety, and that of his
14 family if he did not do so." (ECF No. 47 at 4.)

15 In Ground 2, Nuno Velasco claims that his convictions are unconstitutional
16 because his counsel failed to conduct an adequate investigation prior to the entry of his
17 guilty plea. Here again, respondents note that the amended petition includes additional
18 allegations not included in the initial petition, those being, "that Alvaro ("Sleepy") Romero
19 had admitted to the killing [and] that Roseana Saldana-Armstrong had material evidence
20 to exonerate him." (*Id.* at 5.)

21 With respect to both grounds, this Court concludes that the additional factual
22 allegations do not prevent the respective claim from relating back to the initial petition.
23 See *Atwood v. Schriro*, 489 F. Supp. 2d 982, 997 (D. Ariz. 2007) (citing *Woodward v.*
24 *Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001)). If, however, the new factual allegations
25 have not been developed in state court, 28 U.S.C. § 2254(e)(2) limits a district court's
26 discretion to consider new evidence unless the petitioner was diligent in attempting to

27 ²Nuno Velasco does not dispute that his amended petition was filed beyond the
28 one-year limitation period under 28 U.S.C. § 2244(d). ECF No. 62.

1 develop the facts before the state court or other exceptions apply. See *Cooper-Smith v.*
2 *Palmateer*, 397 F.3d 1236, 1241 (9th Cir.2005).

3 It is therefore ordered that respondents' motion to dismiss (ECF No. 51) is denied
4 as to timeliness issue and denied as moot as to petitioner's failure to exhaust Ground 5.

5 It is further ordered that the respondents will have forty-five (45) days from the date
6 on which this order is entered to answer the remaining claims in the petition. To the extent
7 they have not done so already, respondents must comply with Rule 5 of the Rules
8 Governing Section 2254 Cases in the United States District Courts. Petitioner will have
9 forty-five (45) days from the date on which the answer is served to file a reply.

10 It is further ordered that respondents' motion for extension of time (ECF No. 63) is
11 granted *nunc pro tunc* as of October 10, 2016.

12 DATED this 2nd day of March 2017.

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15 MIRANDA M. DU
16 UNITED STATES DISTRICT JUDGE
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